

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.20 OF 2016

Kalyan S/o Babasaheb Waghmare & another

Petitioners

Versus

Raosaheb S/o Sitaram Kotule
since deceased through his LRs
Sharad S/o Raosaheb Kotule

Respondent

Mr .H.V. Tungar advocate for the petitioners
Mr. G.K. Thigale (Naik) advocate for Respondent

CORAM : **RAVINDRA V. GHUGE, J**

(Date : 27th June, 2017.)

PER COURT :-

1 The petitioner is aggrieved by order dated 4.4.4015 by which Application Exh.65 filed by the petitioner – defendant has been rejected.

2 I have considered the strenuous submissions of the learned Advocates, have gone through the record available and the Judgment of the learned full bench of the High Court of Patna in case of **Asifunisa versus AH Imam** (decided on 14.5.1991).

3 The learned full bench of High Court of Patna has observed in paragraph No.30 as under:-

“ 30. A Commissioner appointed by a court is bound by the direction contained in the writ of appointment. If,

therefore, the Commissioner ignores the writ and submit a report which is contrary to or inconsistent with the direction contained in the writ of appointment, the same would be a nullity. IN a case where the Commissioner delegated his power to so me other persons or where he does not carry out any scientific measurement although required to do so, the report will be vitiated in law. IN all situations, the Court, in my opinion, may set aside the report.

Even in a case i Richards v. Martin, 1875 (23) Suth WR 93, the Calcutta High Court held that a court has the power to appoint a second Pleader Commissioner. The said decision was distinguished in Subramoniam's case (supra) on the ground that at what point of time, the provisions were governed by Section 180 of the Code of Civil Procedure, 1859, which did not contain a provisions like Sub-Rule 3 of Rule 10 of Order XXVI of the Code.

This finding is evidently contrary to the other findings of the same decision. If the Court has an inherent power to appoint a Second Pleader Commissioner in terms of Section 14 of the General Clauses Act r otherwise, evidently, Sub-Rule 3 of Rule 10 of Order XXVI of the Code would not make any difference in exercising such a power, Sub-Rule 3 of Rule 10 of Order XXVI, as has been held in Subramoniam's case, contemplated further inquiry meaning thereby the same Pleader Commissioner and not by a Second Pleader Commissioner.

A second Pleader Commissioner, thus may be appointed when the Court is dis-satisfied with the report of the first Commissioner. "

application Exh.25 on 15.11.1988. Four aspects were put forth for seeking appointment of the Court Commissioner. The Respondent – original plaintiff consented by his Say dated 15.11.1988 that only two aspects can be considered by the Court Commissioner i.e. what is the length, breadth and spot at which the plaintiffs plot is situated and whether the plaintiff is permitted to construct on the said plot and if yes, how much is the area of construction. The trial Court by order dated 27.2.1989 directed the TILR of district Land Records Office, Beed, as a Court commissioner, to measure the plot and spot and submit a report.

5 There is no dispute that a report was submitted on 21.2.2014 after about 25 years of the order appointing a Court Commissioner.

6 The grievance of the petitioner – defendant is that neither a proper report has been filed by the Court Commissioner, nor measurement of the properties mentioned in the map or even the Panchanama are carried out.

7 During the course of the submissions of the learned Advocates, there is a consensus that since the report as well as the map and Panchanama do not indicate the measurements made by the Court Commissioner and since the points No.1 and 2

below paragraph No.6 of Exh.25 do not appear to have been considered, the Trial Court may be directed to appoint the TILR Beed to carry out proper measurement of the suit plot, carry out a Panchanama and submit a report along with the map mentioning the details on point Nos.1 and 2 below paragraph No.6 of Exh.25.

8 Considering the above and since I find that the report of the Court Commissioner dated 21.2.2014 cannot be termed as a report and since the maps and Panchanama do not mention the actual measurement and the construction erected, if any, I find it appropriate to accept the request of the learned Advocates.

9 As such, this petition is partly allowed. Order dated 4.4.2015 below Application Exh.65 stands quashed and set aside. Application Ex.65 is allowed and the Trial Court is directed to appoint the TILR, Beed as a Court Commissioner with the following directions:-

A) The Court Commissioner shall visit the plaintiff's suit plot on 15.7.2017 at 11 a.m..

B) Litigating sides agree to remain present at the suit plot on the said date and time without fail.

Hence, notices need not be issued by the TILR.

C) The TILR shall measure the plaintiffs plot, note

the length and width of the plot and indicate whether there is any construction erected on the said suit plot and to what extent does the construction appear to be.

D) The Court Commissioner shall mention the correct measurements in his report as well as in the Panchanama and in the maps and submit these documents before the Trial Court on or before 31.7.2017.

E)The petitioner shall deposit the requisite fees before the Trial Court on or before 10.7.2017 and failing to do so will result in recalling of this order and the impugned order then shall stand restored.

10 Considering that the suit has been instituted in 1987 and is 30 years old, the trial Court shall endeavor to decide the said suit as expeditiously as possible and on or before 22.12.2017. The litigating sides are precluded from seeking unnecessary adjournments on unreasonable and trivial grounds and costs can be imposed by the trial Court, if such adjournments are sought.

(RAVINDRA V. GHUGE , J)